

As to the purposes of the Act, the prior Commission itself essentially confirmed in the *Texas Order* that state barriers to municipal involvement in telecommunications activities are inconsistent with the pro-competitive, deregulatory goals of the Act. In the Commission's own words, Congress enacted the Telecommunications Act to create a "pro-competitive, deregulatory national policy framework" that would enable "*all* providers to enter *all* markets." *Texas Order*, ¶ 1; *Interconnection Order*, ¶ 4 (emphasis added). Congress enacted Section 253, again in the Commission's words, "to ensure that its national competition policy for the telecommunications industry would indeed be the law of the land and could not be frustrated by the isolated actions of individual municipalities or states, including . . . the actions of state legislatures." *Texas Order*, ¶ 4. Likewise, as indicated above, Chairman Kennard recently testified that one of the primary objectives of the Act is to remove barriers that preclude consumers from choosing providers "from as wide a variety of providers as the market will bear." (Attachment A hereto).

Obviously, state barriers that impair the ability of municipalities and municipal electric utilities from providing or facilitating the provision of telecommunications services in their communities are inconsistent with these goals. The Commission itself acknowledged this when it urged other states not to do what Texas had done, finding that "[m]unicipal entry can bring *significant benefits* by making additional facilities available for the provision of competitive services." *Texas Order*, ¶ 190 (emphasis added).¹⁴

The reality in Missouri is that unless the Commission acts forcefully to preempt HB 620, there will be no effective competition and no real consumer choice for years. That will be especially true in rural areas, which could well be ignored by private telecommunications

¹⁴ The Missouri Municipals believe that the Commission gave the purposes of the Act too little weight. Preemption is appropriate "where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress." *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 368-69. That is true of the Texas law, as the Texas Public Utilities Commission's recent findings now underscore. See Attachment D. It is equally true of HB 620.

providers, just as private electric power companies ignored them years ago. Municipalities and municipal electric utilities in Missouri are ready, willing and able to serve their communities, as they have done with success in the electric power area for decades. The Commission should act promptly, clearly and forcefully to eliminate the barriers that HB 620 poses to their doing so.

C. The Commission's Own Interpretations Support the Conclusion that the Term "Any Entity" Applies to Municipalities and Municipal Electric Utilities

The Commission has had many opportunities to interpret the terms "any" and "entities." Except for its decisions in the *Texas Order* and the reversed *Alarm Industry* case, the Commission has interpreted these terms in a manner that supports preemption in this case. As shown above, the Commission's orders and forms implementing the Universal Service Program have consistently included municipalities and municipal electric utilities as "entities" that are subject to contribution obligations if they provide "telecommunications service" or "interstate telecommunications." The Commission has treated municipalities and municipal electric utilities as "entities" whose attachments must be counted for the purposes of allocating pole-attachment costs. The Commission has also routinely found municipalities to be "entities" that the Commission must include in its regulatory flexibility analyses. In each of these interpretations, the Commission supported its conclusion with references to the relevant authorities. In sharp contrast, the Commission's interpretation of Section 253(a) was not supported by any persuasive authority, but instead is contradicted by the language, structure, legislative history and purposes of the Telecommunications Act. The Commission should now reconsider and reverse.

D. Because HB 620 Cannot Be Sustained Under Section 253(b), The Commission Must Preempt It Under Section 253(d)

For the reasons discussed in the previous sections, the Missouri Municipals submit that HB 620 violates Section 253(a). Section 253(d) therefore requires the Commission to preempt HB 620, unless the State of Missouri can justify it under one of the public-purpose exceptions set forth in Section 253(b). The criteria that the State must satisfy are as follows:

Section 253(b) preserves a State's authority to impose a legal requirement affecting the provision of telecommunications services, but only if the legal

requirement is: (i) "competitively neutral"; (ii) consistent with the Act's universal service provisions; and (iii) "necessary" to accomplish certain enumerated public interest goals. Thus, we must preempt the [measures in issue] pursuant to section 253(d) unless they meet all three of the criteria set forth in section 253(b).

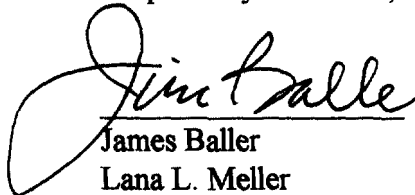
In the Matter of Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling, CCBPol 97-1, *Memorandum and Order*, FCC 97-336, ¶ 40 (rel. September 9, 1997) (footnote omitted).

HB 620 is not "competitively neutral," as its restrictions apply only to municipalities and municipal electric utilities. It undermines the Telecommunications Act's universal service provisions by reducing both the number of potential providers of universal service and the number of potential contributors to universal service mechanisms. HB 620 was not promoted, nor can it now be defended, as "necessary" to achieve any of the public interest goals enumerated in Section 253(b). Rather, the sole purpose of HB 620 was to preserve the monopolies of incumbent telecommunications providers in local markets throughout Missouri. Section 253(d) therefore *mandates* that the Commission preempt HB 620.

CONCLUSION

For all of the foregoing reasons, the Missouri Municipals urge the Commission to preempt HB 620 and declare it unlawful and unenforceable.

Respectfully submitted,



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